Supreme Court, U.S.
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No. 96-612

In The

Supreme Court of the United States

October Term, 1996

WILLIE E. SHEFFIELD,

Petitioner,

v.

LILLIAN P. ANDREWS, individually and as attorney-in-fact for Minnie May Pugh,

Respondents.

On Petition For Writ Of Certiorari To The Alabama Supreme Court

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Pursuant to Rule 15, Respondent Andrews ("Miss Lillian") takes this opportunity to correct some of the factual statements in the petition, as well as relate to the Court additional facts which Petitioner Willie E. Sheffield ("Sheffield") fails to reveal.

At the time of the trial, Miss Lillian was a 91-year-old widow. (R. at 313). She was in good health, except for very poor eyesight. (R. at 319-20). For all practical purposes, Miss Lillian was unable to read, even with very strong eyeglasses combined with a magnifying glass. (R. at 241 and 320).

Miss Lillian depended on her trusted friend and attorney, James A. Tucker, Jr., ("Tucker") to tell her what a particular document was, and what to sign. (R. at 322). It was undisputed that she trusted Tucker to tell her what documents to sign. (R. at 242).

Miss Lillian's sister, Minnie May Pugh ("Miss Minnie May"), was 90 years old at the time of the trial. (R. at 314). Miss Minnie May had suffered a mind-destroying stroke in 1991 and was unable to attend or participate in the trial. (R. at 314).

Tucker was a practicing attorney in Jackson, Alabama, having practiced law there some thirteen years. (R. at 146, 147 and 235). Tucker represented Miss Lillian's husband until he passed away in 1986. (R. at 147-148; 342-345). After Mr. Andrews died, Tucker continued to represent Miss Lillian on many matters, including trusts, estate planning, taxes and investments. (R. at 345-347).

In addition to being her lawyer and advisor, Tucker was her trusted friend (R. at 147, 149, 189, 322 and 329). Tucker went to church with Miss Lillian, socialized with Miss Lillian and would bring his wife and children over to play in her yard. (R. at 321). She relied completely on Tucker to tell her what documents she needed to sign. (R. at 322).

The Petitioner, Sheffield, resides in Grove Hill, Alabama. (R. at 514). Sheffield is a very experienced investor in real estate, timber and oil and gas. (R. at 518 and 586). Sheffield has been engaged in the business of dealing in real estate, timber and oil and gas since 1962. (R. at 518). Sheffield specialized in undivided interests in property. (R. at 589). At trial, the parties stipulated that from December 29, 1988, through June 15, 1991, Sheffield was involved in some 56 real estate transactions in Clarke County, Alabama, alone. (R. at 587 and 588).

The property involved in this lawsuit consists of three adjoining tracts of land located in Clarke County, Alabama. (R. at 503; Original Trial Exhibits 44, 46 and 47).

The largest tract, commonly referred to as the "Gordon Pugh Hearn property" consists of approximately 1300 acres. (R. at 504). This tract had been purchased many years ago by three brothers-in-law, Mr. Gordon, Mr. Pugh (the father of Miss Lillian and Miss Minnie May), and Mr. Hearn. (R. at 317; C. at 1293-1298). After the death of their parents, and prior to February, 1992, Miss Lillian and Miss Minnie May each owned an undivided one/sixth (1/6) interest in the Gordon Pugh Hearn property. (R. at 503 and 365). In February, 1992, Miss Lillian, Miss Minnie May and the other joint owners divided the

Gordon Pugh Hearn property. (R. at 502-508; C. at 1303-1317). In the division, Miss Lillian and Miss Minnie May each received an undivided one-half (1/2) interest in approximately 445 acres. (R. at 502-508; C. at 1303-1305). At trial, William M. Wright, an expert forester, valued the property received by Miss Lillian and Miss Minnie May in the division at $1,366,399.80. (R. at 280, 287 and 301; Original Trial Exhibit 46). Further, Mr. Wright testified that in his opinion, this property was worth $940,482.61 in 1991. (R. at 290-291 and 310; Original Trial Exhibit 46).

The other two tracts of land were commonly referred to as the "Carrie Pugh property" and the "Isaac Pugh property." (R. at 365-366). The Carrie Pugh property was approximately 80 acres. (R. at 317-318; C. at 1286-1292). Miss Minnie May and Miss Lillian each owned an undivided one-half (1/2) interest in these two tracts and had so owned the same for many years. (R. at 317, 365-366, C. 1286-1292). At trial William M. Wright valued these two tracts at $420,834.68 and $175,330.68, respectively, at the time of the trial. (R. at 289-290, 310; Original Trial Exhibit 46). Mr. Wright valued these tracts at $287,430.73 and $121,312.53, respectively, in 1991. (R. at 291, 310; Original Trial Exhibit 46).

After February, 1992, Miss Lillian and Miss Minnie May were equal joint owners of the Carrie Pugh property, the Isaac Pugh property, and the approximately 445 acres which they received from the Gordon Pugh Hearn division. (R. at 309-310). William M. Wright valued these three tracts at $1,962,565.16 at the time of trial. (R. at 290; Original Trial Exhibit 46). Further, Mr. Wright valued these three tracts to be worth $1,349,225.39 in 1991. (R. at 291; Original Trial Exhibit 46). For simplicity, these three

tracts will be hereinafter referred to collectively as the "subject property."

At some point in the fall or winter of 1990, Sheffield approached Miss Minnie May wanting to buy the subject property. (R. at 523). Miss Minnie May told Sheffield that it was not for sale, asked him to leave and not to come back. (R. at 336). Miss Minnie May, apparently upset at being offered a paltry $250,000.00 for the property, called Miss Lillian and relayed the conversation that she had with Sheffield. (R. at 336).

Next, Sheffield went to Miss Lillian's home in early 1991, wanting to buy the Gordon Pugh Hearn property. (R. at 322-323). Miss Lillian told him unequivocally that it was not for sale. (R. at 323-324).

At this point, Sheffield had been told that the property was not for sale by both Miss Lillian and Miss Minnie May. (R. at 323-324, 336). Unable to get the property by legitimate means, Sheffield decided to employ other methods.

Some time prior to March, 1991, Sheffield met with Tucker at Radley's Deli in Jackson, Alabama. (R. at 190-191 and 215). At this meeting, Sheffield offered Tucker $15,000.00 if Tucker would "help" him get subject property. (R. at 191 and 215). Sheffield assured Tucker that the $15,000.00 payment was just between them and that "nobody else would ever know about it." (R. at 219, 229 and 396-397).

At some point in 1991, Sheffield approached Robert B. Bowling, III. (R. at 259 and 535). Mr. Bowling was a long-time friend of Miss Lillian. (R. at 259). Miss Lillian

had been a friend to Mr. Bowling all of his life and had leased the hunting rights to him in the subject property for $1.00 per acre per year, for forty years. (R. at 261-262, 318-319). Sheffield knew that Mr. Bowling was close to Miss Lillian. (R. at 536 and 268). Sheffield approached Mr. Bowling and offered him a $50,000.00 bribe to try to influence Miss Lillian into selling her interest in the Gordon Pugh Hearn property. (R. at 259-260 and 268). Mr. Bowling refused to do this, and he did not think it was right to do this to a good friend. (R. at 260 and 268).

In early March, 1991, Tucker called Miss Lillian and told her that Sheffield had left a check for $125,000.00 at his office to purchase her interest in the Gordon Pugh Hearn property. (R. at 154 and 324). Miss Lillian informed Tucker that he could give Sheffield the check back, as she was not going to sell her land. (R. at 324). It was undisputed that Tucker did not have written documentation or authority to sell Miss Lillian's land. (R. at 233, 324-325). Also, this check for $125,000.00 was never endorsed and was picked up by Sheffield. (R. at 232). In addition, the $125,000.00 purchase price was set by Sheffield. (R. at 154).

However, unknown to Miss Lillian, Tucker had gotten her signature on three documents. (R. at 324-325). These three documents were all dated March 6, 1991, and were all notarized or witnessed by Tucker. (R. at 149-150; C. at 1277-1284). These three documents consisted of a warranty deed, an agreement, and a hunting permit, all of which purported to convey Miss Lillian's interest in the Gordon Pugh Hearn property to Sheffield. (C. at 1277-1284; Original Trial Exhibit 1, 2 and 3). At trial, the parties stipulated that these three documents had been

signed by Miss Lillian. (R. at 358-359.) However, Miss Lillian made it perfectly clear that she did not knowingly sign any of the March 6, 1991, documents knowing they would transfer her interest in the Gordon Pugh Hearn property to Sheffield. (R. at 324-325). At the time Miss Lillian signed the March 6, 1991, documents, she did not know that these documents were documents that would transfer her interest in the Gordon Pugh Hearn property to Sheffield. (R. at 324-325). Unable to read due to her poor eyesight, Miss Lillian trusted and relied on Tucker to tell her what to sign. (R. at 149, 322 and 359). Miss Lillian would not have signed these documents had Tucker told her the truth about what they were. (R. at 324 and 333). Miss Lillian has never knowingly signed a deed or an agreement giving Sheffield an interest in her property. (R. at 319).

Coincidentally, on March 6, 1991, the same day that Tucker got Miss Lillian's signature on these three documents, Sheffield paid Tucker $5,000.00 in cash. (R. at 155 and 157). Sheffield gave this $5,000.00 to Tucker in an envelope. (R. at 158). This $5,000.00 payment was partial payment pursuant to their conversation at Radley's Deli. (R. at 155). Miss Lillian was not informed of this payment. (R. at 155).

From 1991 until shortly before this lawsuit was filed, Miss Lillian did not know that Sheffield was claiming her property. (R. at 332). Miss Lillian continued to pay the property taxes on the subject property for the years 1992, 1993, and 1994. (R. at 333). After her stroke, Miss Minnie May required around the clock sitters, so Miss Lillian sold some timber to help pay these expenses. (R. at 346). Also, part of subject property became infested with pine

beetles in 1992 and 1993, so Miss Lillian sold more timber. (R. at 489-495). In both 1992 and 1993, the timber cuttings were halted before completion because Tucker said Miss Lillian would have an income tax problem. (R. at 494-496). At no time did Tucker say anything about the subject property having been sold. (R. at 182 and 496). Miss Lillian was unaware that Sheffield was claiming her property until April, 1994. (R. at 331-332). However, much transpired regarding her property from March, 1991, to April, 1994, without her knowledge. (R. 331-332).

In late 1991 or early 1992, Miss Lillian and the other joint owners of the Gordon Pugh Hearn property worked out a division of the Gordon Pugh Hearn property. (R. at 506). The joint owners contacted a lawyer in Grove Hill, Bruce Wilson, to work out the descriptions and prepare division deeds. (R. at 502 and 506). These division deeds were executed in February, 1992. Twenty acres was omitted from one of these deeds, so a fourth deed was executed in July 1992. (R. at 508). Jimmy Tucker did not participate in this division, other than to notarize some of the division deeds. (R. at 240 and 508).

In April of 1992, Tucker prepared the Last Will and Testament of Miss Lillian. (R. at 326 and 445; C. at 1318-1326; Original Trial Exhibit 20) (See Appendix A). This will was executed on April 29, 1992, in Tucker's office. (R. at 163). This will set up a Trust which gave the Trustees, Tucker and Doris Anderson, very broad powers to dispose of Miss Lillian's estate, after her death, and give the proceeds to certain charities. (R. at 163-164, 339; C. at 1318-1326) (Appendix A). Article Four of this will exempted the Trustees from giving a bond, report, inventory, etc., and gave them very broad powers to manage or

dispose of Miss Lillian's estate. (C. at 1319-1324). The will was only signed by Miss Lillian in one place, on the page after Article Five ended. (R. at 449-451; C. at 1318-1326). Also, each page of the will was not initialed by the testatrix, Miss Lillian, or the two witnesses. (R. at 449-450). This was unusual, as it was Tucker's normal practice when executing wills to have the testators and both witnesses initial each page. (R. at 449-450). When the two witnesses mentioned the fact that each page was not being initialed, Tucker informed them to "just do it, it is none of your business." (R. at 450-451).

However, unknown to Miss Lillian, Tucker had also prepared a "new" Article Four to her will. (R. at 166, 452; C. at 1395; Original Trial Exhibit 21) (See Appendix M to Petitioner's Brief). The "new" Article Four is much different from the other Article Four (See Appendix A). (R. at 165-166). The "new" Article Four provides that subject property would be sold to Sheffield for $250,000.00. (R. at 166; C. at 1395). It also provided that if Miss Lillian had acquired any additional property (i.e., Miss Minnie May's undivided interest), then the additional property would be sold to Sheffield for consideration equal to the per acre amount. (R. at 166). Miss Lillian knew of nothing in her will giving Sheffield the exclusive right to buy her property. (R. at 167-168 and 327). The $250,000.00 purchase price had been set by Sheffield. (R. at 168). Tucker provided Sheffield with a copy of the "new" Article Four. (R. at 168). Also, the "new" Article Four has no place for the testatrix to sign, and is in fact unsigned by Miss Lillian. (C. at 1395; Original Trial Exhibit 21) (See Appendix M to Petitioner's brief).

Shortly after March 6, 1991, Tucker tried to return the $5,000.00 cash payment to Sheffield. (R. at 393-394). However, Sheffield refused to take the $5,000.00 back, saying "no, that $5,000.00 is yours, that's just between me and you." (R. at 394). After March 7, 1991, Sheffield and Tucker had some thirty conversations. (R. at 162 and 396). Tucker would tell Sheffield that Miss Lillian did not want to sell her property. (R. at 396). Every time Tucker would tell Sheffield that Miss Lillian did not want to sell, Sheffield would remind him of the money he had given him. (R. at 396-397). Sheffield would remind Tucker that Tucker had the money and that they were the only two people who knew. (R. at 397). Tucker believed that somebody would be told about this money unless he got subject property conveyed to Sheffield. (R. at 397).

On May 15, 1992, Sheffield and Tucker met in Tucker's office. Sheffield gave Tucker a check for $428,500.00, drawn on the account of Welch Timber, Inc., made payable to the James A. Tucker Trust Account. (C. at 1402). This money was the proceeds of an unrelated timber sale by Sheffield. (C. at 1399-1401). Also, on May 15, 1992, an agreement between Tucker and Sheffield was executed. (C. at 1397-1398; Original Trial Exhibit 22) (See Appendix K of Petitioner's brief). This agreement recited that Sheffield was paying the $428,000.00 to Tucker, in trust, for the purpose of purchasing property from Miss Lillian. (R. at 169-170; C. at 1397-1398). Tucker admitted that Miss Lillian was never informed of the existence of the May 15, 1992, agreement between Tucker and Sheffield. (R. at 170-171). This agreement was signed without Miss Lillian having any knowledge of it whatsoever. (R.

at 171 and 328). In fact, Sheffield requested this agreement and told Tucker what he wanted in this document. (R. at 233).

Further, on May 15, 1992, Sheffield paid Tucker $10,000.00 by check. (R. at 174; C. at 1404; Original Trial Exhibit 25) (See Appendix B). This $10,000.00 was the balance owed on the $15,000.00 payoff. (R. at 174-175). Miss Lillian was never informed of this $10,000.00 payment from Sheffield to Tucker. (R. at 175).

Tucker deposited the $428,500.00 check (which was purported to be consideration for the purchase of Miss Lillian's land) into his trust account, then used $400,000.00 of it to purchase a certificate of deposit at Merchants Bank in Jackson. (R. at 173; C. at 1373). This CD was in the name of James A. Tucker, Jr., as Trustee for Willie E. Sheffield. (R. at 173, 611; C. at 1373) (See Appendix C). This CD had Sheffield's social security number on it. (R. at 187, 611-613; C. at 1373). Income taxes on the interest on this CD were under Sheffield's social security number. (R. at 613-614; C. at 1354). Miss Lillian's name does not appear on this CD anywhere. (R. at 611). Miss Lillian was never informed of this CD and did not know Tucker was holding this money. (R. at 223 and 327-328). Miss Lillian never received any benefit from this money. (R. at 173).

After Miss Lillian cut some timber in May or June, 1992, Sheffield informed Tucker to prepare another agreement. (R. at 182). Sheffield told Tucker what to put in this agreement. (R. at 232-233). On September 2, 1992, Miss Lillian executed an agreement between herself and Sheffield. (R. at 176-177; C. at 1978-1979; Original Trial Exhibit

28; Appendix L to Petitioner's brief). This agreement recited that $428,500.00 was in trust, that the purchase price was to be either $250,000.00 or $500,000.00, depending on the interest owned, and that the purchase price would be adjusted downward to reflect the value of the timber that was cut. (R. at 178; C. at 1978-1979). The signatures of both Miss Lillian and Sheffield were notarized by Tucker. (R. at 176-177; C. at 1979). Once again, Miss Lillian relied on Tucker to tell her what the document was. (R. at 177 and 329-330). Tucker misrepresented the nature of this agreement to Miss Lillian. (R. at 177, 223 and 329-330). Tucker told her it had to do with the tax consequences of the timber cutting. (R. at 177). Miss Lillian was totally unaware that this document had anything to do with selling any land to Sheffield. (R. at 329). Tucker admitted that he tricked Miss Lillian into signing the September 2, 1992, agreement because of pressure being exerted on him by Sheffield about the $15,000.00 payoff. (R. at 413).

On February 28, 1994, Miss Lillian executed a hunting lease on subject property to Robert S. "Bob" Bowling, III. (R. at 261; C. at 1980). Mr. Bowling recorded this lease on March 11, 1994. (R. at 263; C. at 1982). Shortly thereafter, Sheffield approached Bowling and offered him $10,000.00 for the hunting lease. (R. at 264-265). When Bowling refused, Sheffield became agitated and informed him that he owned the property and "when the old lady dies, I will throw you off of it." (R. at 265).

Bowling reported this to Miss Lillian. (R. at 165). Then, armed with a Power of Attorney for Miss Lillian, Bowling went to Tucker's office and demanded all of her papers. (R. at 265-266). Tucker was not at the office, but

his secretary provided Bowling with a box of documents. (R. at 275).

On April 26, 1994, Tucker gave a statement to Miss Lillian's attorney, basically confessing everything. (R. at 405). On April 27, 1994, Sheffield confronted Tucker and told Tucker everything that Tucker had said in the statement to Miss Lillian's attorney. (R. at 405). At this meeting, Tucker directly told Sheffield that Miss Lillian did not know what she signed. (R. at 405-406). Sheffield then told Tucker that they "needed to look out for each other." (R. at 406). Further, Sheffield advised Tucker that he "didn't have to worry about his family." (R. at 407).

Sheffield recorded the May 15, 1992, agreement between himself and Tucker and the September 2, 1992, agreement on April 29, 1994, at 9:17 a.m. and 9:18 a.m. (R. at 639). This lawsuit was filed later that day.

Following a jury verdict for the Plaintiffs, the trial court entered a judgment setting aside the fraudulent documents, quieting title to the property in the Plaintiffs, and awarding compensatory damages of $10.00 and punitive damages of $2,000,000.00 against the defendants for the conspiracy to defraud. (C. at 357-363).

On February 27, 1995, Sheffield filed a postjudgment motion which asked for, among other things, a remittitur of the punitive damage award. (R. at 364-369). In support of this motion, Sheffield also filed an affidavit showing what he claimed to be his assets, liabilities and net worth. (R. at 370-372) (See Appendix J to Petitioner's brief).

At the Hammond/Green Oil hearing, Sheffield contended that the punitive damage award was excessive

considering that he claimed his net worth was only $750,300.00. (R. at 240-251; C. at 370-372). Miss Lillian put on evidence that not only had Sheffield undervalued his assets, but that since the judgment was entered on February 9, 1995, Sheffield had conveyed property to family members and had taken over $500,000.00 cash out of the bank and "lost" it. (C. at 901-903; Supplemental Vols. 1 & 2 at 175; C. at 843).

Sometime after the judgment, but before his affidavit was filed, Sheffield went to Merchants Bank in Jackson, Alabama, and withdrew over $500,000.00 from two certificates of deposit. (C. at 901-902). One of these CD's was in the name of "Adam Henson or Willie Sheffield" and was in the principal amount of $250,000.00. (C. at 1032). The other CD was in the name of "Abbey Henson or Willie Sheffield" and had a principal amount of $250,000.00. (C. at 1032). Abbey Henson and Adam Henson are Sheffield's minor grandchildren. (R. at 902).

Sheffield testified that he took the $500,000.00 and went to Florida and bought some lottery tickets. (R. at 903). Then he went to a casino boat in Biloxi, Mississippi, got drunk, and the $500,000.00 was either lost gambling or was stolen – he did not know which. (C. at 902-903; Supplemental Vols. 1 & 2 of R. at 175-178). This money was *not* listed in Sheffield's affidavit in support of his Consolidated Postjudgment Motion. (C. at 364-372; Appendix J to Petition). Sheffield explained this oversight by claiming it was in the grandchildren's names. (Supplemental Vols. 1 & 2 at 174).

Miss Lillian also presented evidence that Sheffield failed to list on his affidavit $51,000.00 worth of vendor's

liens he was owed. (Supplemental Vols. 1 & 2 at 173). Miss Lillian presented other evidence as to various inconsistencies and omissions from Sheffield's affidavit. (Supplemental Vols. 1 & 2 at 251-256).

Also, at the Hammond hearing, two foresters who appraised some of Sheffield's real property independently of one another, valued a particular tract at $43,915.25 and $41,749.70, respectively. (Supplemental Vols. 1 & 2 at 80-83 and 106-110). Sheffield had valued this tract at $18,000.00. A tract of commercial property which had been valued by Sheffield at $48,000.00 was appraised by a certified real estate appraiser at $235,000.00. (Supplemental Vols. 1 & 2 at 115-123; C. at 370-372).

Miss Lillian presented evidence that Sheffield, after the judgment was entered, but prior to the Hammond/Green Oil hearing, conveyed his interest in his 242.5 acre homeplace to his wife and his interest in 60 acres to his daughter and son-in-law. (Supplemental Vols. 1 & 2 at 67; C. at 841-843 and 892-894). While these deeds purported to have been executed in 1992 and 1993, they were not recorded until March of 1995. (C. at 998-1005).

On June 19, 1995, the trial court entered a written order on Sheffield's postjudgment motion. (C. at 549-554). In its order, the trial court found, among other things:

1. That there was sufficient evidence of a conspiracy entered into by the defendants.

2. That there was clear and convincing evidence justifying the award of punitive damages.

3. "There was evidence from which the jury could find, by a clear and convincing standard, that the defendants entered into a conspiracy to defraud the plaintiffs and would have been successful had the plaintiff died prior to the discovery of the fraud."

The trial court also discussed the *Hammond/Green Oil* factors:

1. "The harm caused by the defendant's conspiracy was grievous."

2. Sheffield "was the moving force in the betrayal of Lillian P. Andrews."

3. "Defendant Sheffield's conduct tears at the fabric of our civil justice system. There is no question that Defendant Sheffield knew that his conduct would cause harm and he proceeded to cause the lawyer to sell his client out for $15,000.00. The court determines that there was an attempted cover-up of the fraud in that the deeds were kept off record until near the very end when the fraud had been discovered."

4. "The court determines that the defendant Sheffield at no time attempted to remedy the wrong."

5. Sheffield "has undervalued his real estate holdings by approximately 50%." "Sheffield's assets are probably worth between $1,225,000.00 and $1,500,000.00."

6. "The court does not believe the defendant's testimony that he lost or misplaced $500,000.00 after becoming intoxicated in Biloxi, Mississippi."

7. "An act as despicable as this fraudulent conspiracy should be severely punished" in spite of the fact that

the fraudulent transactions will be rescinded. (C. at 549-554; See Appendix B to Petition).

The trial court reduced the punitive damages award to $1,000,000.00 and remittitur was accepted by Miss Lillian. (C. at 554-557).

Sheffield filed a petition under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Alabama, on July 13, 1995. (C. at 558-560).

Sheffield was ordered by the bankruptcy trustee to turn over the "lost" or "gambled" $500,000.00. When Sheffield refused to do so, The Honorable Richard W. Vollmer, United States District Judge for the Southern District of Alabama, held him in contempt of court and ordered him incarcerated for up to eighteen months. (See Appendix D). In doing so, Judge Vollmer held that "Sheffield's story as to the disappearance of the cash proceeds is incredible; indeed, it is preposterous, bizarre, and insulting." (Appendix D).

Although Sheffield is currently incarcerated, it is because of the contempt of court, *not* because of his criminal conviction as a result of the transactions at issue in this case. Further, Sheffield has appealed his criminal conviction, and the execution of the sentence is suspended, pending the outcome of his appeal. (See Appendix I to Petitioner's brief).

REASONS FOR DENYING THE WRIT

I. Applicable Federal Standards

Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and determining its repetition. *BMW of North America, Inc. v. Gore*, 517 U.S. ___, 116 S. Ct. 1589, 1595 (1996), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (and cases therein).

In our system, states have considerable flexibility in determining the level of punitive damages allowed in different classes of cases and in any particular case. *BMW*, 517 U.S. ___, 116 S. Ct. at 1595. In *BMW*, this Court stated:

> Most states that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deference. See *TXO*, 509 U.S. at 456; *Haslip*, 499 U.S., at 22. Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. CE. *TXO*, 509 U.S. at 456.
>
> *BMW*, 517 U.S. ___, 116 S. Ct. at 1595.

Under the particular facts of this case, the punitive damage award, as remitted, is not even close to being grossly excessive.

II. Applicable Alabama Standards

Alabama recognizes the following factors (known in Alabama as the *Hammond/Green Oil* factors) as governing post-verdict review of punitive damage awards:

From Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala.1986):

1. Culpability of defendant's conduct.
2. The desirability of discouraging others.
3. The impact on the parties.
4. Impact on innocent third parties.

From *Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Ala. 1989)

1. Does the punitive damages award bear a reasonable relationship to the harm likely to occur from the defendant's conduct?

2. The degree of reprehensibility of defendant's conduct, including:

   (a) the duration of the conduct;

   (b) the degree of defendant's awareness of any hazard which this conduct has caused or is likely to cause;

   (c) any concealment or cover-up of the hazard;

   (d) existence and frequency of similar past conduct.

3. Punitive damages should remove the profit, if any, from the defendant and should be in excess of the profit so that defendant recognizes a loss.

4. Defendant's financial position.

5. Cost of litigation to the plaintiff.

6. If defendant has received criminal sanctions, that should be taken into account in mitigation.

7. If there have been other civil actions against the same defendant based on the same conduct, this should be taken into account in mitigation of the punitive damages.

From § 6-11-23, *Ala. Code* 1975 (Supp. 1989):

1. Nature, extent and economic impact of verdict on plaintiff or defendant.

2. Amount of compensatory damages.

3. Whether defendant has been guilty of similar acts in the past.

4. The nature and extent of any effort by defendant to remedy the wrong.

Significantly, in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991), this Court approved these Alabama standard's governing post-verdict review of punitive damage awards.

III. Application of the Standards to the Facts of this Case

The trial court conducted an extensive hearing regarding the *Hammond/Green Oil* factors. (C. at 554-57). Thereafter, the trial court reduced the punitive damage award to $1,000,000.00, which was accepted by Miss Lillian. (C. at 554-57). On appeal, the Alabama Supreme

Court affirmed the punitive damage award, as remitted. (See Appendix D of Petitioner's Brief).

A review of the *Hammond/Green Oil* factors and the facts of this case clearly show that the amount of punitive damages awarded is not grossly excessive, and is in fact, entirely appropriate.

1. The impact on the parties

Petitioner argues that there was no harm done to Miss Lillian, because even if the conspiracy had succeeded, Miss Lillian's trust "would have been funded with cash, instead of land." (Petition at 11-12). This argument ignores the undisputed evidence that subject property was valued at approximately $1.9 million at the time of the trial. The purchase price, which was set by Sheffield *alone*, would have been either $250,000.00 or $500,000.00 (depending on the interest owned at her death). Miss Lillian's trust would have lost well over $1,000,000.00 in assets.

In any event, in *TXO* this Court concluded that "it is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded. . . . "

In our case, had the fraudulent scheme succeeded, the harm would have been well over $1 million dollars. This factor points toward a large punitive damage award.

2. Reprehensibility of the Defendant's conduct

It is hard to even imagine a more reprehensible situation than where a defendant bribes a dishonest lawyer into tricking a 91 year old, trusting widow, out of her family property.

Sheffield concedes that Tucker's conduct was reprehensible. (Petition at 12). However, Sheffield ignores the findings of the trial court that he (Sheffield) was the "moving force" in Tucker's betrayal; that Sheffield knew his conduct would cause harm; and that there was an attempted coverup of the fraud. (C. at 550-51).

Sheffield's conduct was even worse than Tucker's. After being told that the property was not for sale, Sheffield started offering large sums of money to people. (R. at 190, 215, and 259). After he got Tucker to accept some money, Sheffield used it to pressure him into doing the dirty work. Sheffield constantly reminded Tucker about the "money you got" and "that's just between you and me." (R. at 219, 229, and 396-397). Even after the fraud was uncovered, Sheffield told him "we need to look out for each other", and even made a backhanded threat to him in that "you don't need to worry about your family." (R. at 406-407).

Petitioner attempts to explain his failure to record his deed in the public records by claiming Miss Lillian did not want her "family" to know she had sold. This ignores the fact that Miss Lillian is the one who brought the lawsuit, resulting in wide-spread publicity. Also, she is a widow, with no children or grandchildren.

This factor supports a large punitive damage award.

3. The ratio of punitive damages to actual damages.

Petitioner put great emphasis on the difference in the actual damages and the punitive damages (Petition at 13-14). Apparently, Petitioner wants to be rewarded because his fraudulent scheme was uncovered before great actual loss was realized.

However, this ignores the fact that had Petitioner's illicit scheme succeeded, he would have received approximately $1.9 million in real property (its valuation at trial) for either $250,000.00 or $500,000.00. Thus, the potential harm was well over $1 million.

In this respect, this case is very similar to *TXO*. In *TXO*, while the petitioner stressed the shocking disparity between the punitive award and the compensatory award, this Court held "that shock dissipates when one considers the potential loss to respondents, . . . , had petitioner succeeded in its illicit scheme." *TXO*, 509 U.S. at 461-62.

In our case, considering the fact that the potential harm was over $1 million, the punitive damage award was not "grossly excessive." In fact, if the punitive damages are compared to the potential loss, the ratio is less than 1 to 1.

4. Financial Position of the Defendant

Petitioner argues that the award in this case will destroy him financially. (Petition at 15). However, there was significant evidence that Sheffield was less than honest about his net worth. Sheffield contended that he had assets of $965,300.00, liabilities of $245,000.00, and a net

worth of $720,300.00. (C. at 371). He listed $100,000.00 in "deferred taxes", as a liability. (C. at 371). He explained that his $100,000.00 would be owed *if* Miss Lillian executed on and sold his real estate holdings.

After the judgment was entered, but prior to the *Hammond* hearing, Sheffield recorded three deeds which conveyed his undivided one-half (1/2) interest in over three hundred (300) acres to his wife, daughter, and son-in-law. (C. at 371) (Supplemental Vols. 1 & 2 at 173).

Miss Lillian put on evidence that Sheffield undervalued his real estate. The trial court found that Sheffield had undervalued his real estate by approximately fifty percent (50%). (C. at 552). The trial court found his assets to be worth between $1,225,000.00 and $1,500,000.00. (C. at 552). It is unclear whether the trial court meant "assets" or "net worth." However it put "assets." Miss Lillian believes that the trial court meant its figures were Sheffield's net worth, not his assets. In any event, even if it is assumed that the trial court's figures were assets, if his assets are valued at $1,500,000.00 and his liabilities at $245,000.00 (Sheffield's own figures), he has a net worth of $1,255,000.00. After paying the $1,000,010.00 judgment, he would still have almost a quarter of a million dollars. This is far from being "destroyed."

Sheffield also failed to list the two (2) CD's that he had in Merchants Bank with his grandchildren that totaled over $500,000.00. (C. at 371). This is the same $500,000.00 that Sheffield claimed was either lost gambling or stolen, after he got drunk at the casino in Biloxi, Mississippi. (C. at 903). Sheffield was not sure which. (C.

at 903). The trial court did not believe this testimony. (C. at 552).

Taking Sheffield's net worth of $720,300.00 from his *own* affidavit (which did not list the "gambling" $500,000.00 and which the trial court found undervalued his real estate values by 50%) and adding to it the "gambling" $500,000.00, then his net worth goes to $1,220,300.00. After paying off the judgment, Sheffield would still have over $200,000.00. The vast majority of honest, working people in this state do not have a net worth at $200,000.00. Sheffield's testimony about the $500,000.00 is undoubtably one of the most ridiculous and insulting stories ever told in an Alabama courtroom. The trial court did not believe this story, nor did the U.S. Bankruptcy Court, nor did the U.S. District Court, which incarcerated him for contempt (See Appendix D).

5. Comparative Cases

While comparative analysis is a consideration, its value has been questioned by this Court, in *TXO*. In *TXO*, this Court recognized that each case is unique. *TXO*, 509 U.S. at 457-58.

The present case is extremely unique and bears no resemblance whatsoever to the cases cited by Petitioner.

In this case, Sheffield, a very experienced real estate guru, bribed a dishonest lawyer into betraying an elderly client. However, the elderly client simply refuses to die, and worse yet, she keeps selling timber on the property and leasing out the hunting rights, forcing Sheffield and Tucker to prepare more and more fraudulent documents.

6. Profitability to the Defendant

Because of the high value of the subject property, had the scheme not been uncovered, the *potential* for a huge profit was there.

The punitive damages should not be reduced simply because the defendants were caught *before* the profit was made.

7. Criminal Sanctions

Quite properly, Sheffield was convicted for his part in this horrible story. However, he has appealed his conviction and the execution of the sentence was suspended, pending the outcome of the appeal. (See Appendix I to Petition).

Sheffield is currently incarcerated as a result of the finding of civil contempt in U.S. Bankruptcy Court, *not* because of any criminal sanctions in this case. (See Appendix D).

8. Costs of Litigation

Miss Lillian had in excess of 300 attorney hours and approximately $11,000 in out-of-pocket expenses through May 22, 1995. (Supplemental Vols. 1 & 2 at 78).

9. Efforts to Remedy the Wrong

Up until the day of trial, Miss Lillian offered to dismiss her case against Sheffield if he would give her a quitclaim deed to the property. Sheffield would get the

money he deposited with Tucker. Sheffield refused. (Supplemental Vols. 1 & 2 at 178).

The morning of the trial, Sheffield offered to give the land back if Miss Lillian would pay him $750,000.00, with her getting credit for the approximately $400,000.00 which had been deposited with Tucker. In sum, Miss Lillian would have had to pay approximately $350,000.00 to Sheffield.

The trial court found that at no time did Sheffield try to remedy the wrong. (C. at 551).

This factor points toward a large punitive damage award.

10. Other Civil Actions

There are no other civil actions which can be brought against Sheffield. This is Miss Lillian's one chance for justice.

This factor does not point toward a remittitur.

IV. Petitioner also argues that because he "received no prior notice of the severe penalty that might be and, in fact, was imposed against him" the punitive damage award should be reduced. However, Sheffield never raised this issue either with the trial court or the Alabama Supreme Court.

Apparently, Sheffield takes this argument from language found in *BMW v. Gore*, 116 S.Ct. at 1598.

This Court wisely refuses to review judgments rendered by a state's highest court unless the federal question was both raised and decided in the state Court's below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the Court will refuse to consider claims that were not raised or addressed below). See also *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (failure to follow proper appellate procedures provided by state law is fatal). Because Sheffield failed to properly preserve this issue below, it should not be considered by this Court.

V. The Alabama Supreme Court has already reviewed this case in light of this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. ___, 116 S.Ct. 1589 (1996) [See p. 28a to Appendix F of Petitioner's brief].

CONCLUSION

In light of the despicable facts in this case, the Petition for Writ of Certiorari is due to be denied.

Respectfully Submitted,

WYMAN O. GILMORE, JR. *
LAMAR C. JOHNSON
Gilmore Law Office
Post Office Box 729
Grove Hill, Alabama 36451
(334) 275-3115

* *Counsel of Record*

APPENDIX A

Last Will and Testament

of

LILLIAN P. ANDREWS

I, LILLIAN P. ANDREWS, a resident of the State of Alabama, Clarke County, being of sound mind and disposing memory, do hereby make, publish and declare this instrument as and for my Last Will and Testament, and hereby expressly revoke all wills and codicils heretofore made by me.

ARTICLE ONE

I direct that all my debts and funeral expenses and the costs of administration of my estate be paid as soon as practicable after my death.

ARTICLE TWO

After payment of my debts and funeral expenses, I will bequeath and devise all the rest, residue and remainder of my estate unto Doris Anderson and James A. Tucker, Jr. as Trustees to use said property or the income derived from the use or sale of said property for charitable purposes. In particular for use as scholarship for persons in Clarke County wishing to attend Huntington College and Livingston University or for any other charitable use my Trustees deem appropriate. I request that my Trustees deed my home and garden to the City of Jackson for use as a museum for so long as it is used in such a manner and protected appropriately. Should my Trustees deem that said home and gardens are not being

utilized as a museum and/or not being properly protected, they shall take the appropriate action to have said home and gardens returned to the trust created hereunder.

ARTICLE THREE

Under the provisions of Paragraph 4 of Item Ten of the Last Will and Testament of my late beloved husband, Walter Wild Andrews, which said Last Will and Testament which has been duly admitted to probate in the Probate Court of Clarke County, Alabama, I was given a power of appointment over the corpus of the Trust created under said Item Ten remaining at the time of my death. It is my intention to exercise such power of appointment and I do hereby exercise such power of appointment and appoint, direct, give, devise and bequeath all of the remaining corpus in said trust and the accumulated income therefrom to the Trustees of the Trust created under Article Two hereof to become a part of the Trust Estate of said trust and to be held and disposed of in accordance with the terms and provisions of said trust.

ARTICLE FOUR

The Trustees are hereby relieved and exempted from the necessity of giving any bond or other security and from the necessity of filing any reports, inventories, settlements or accountings in any court but they shall nevertheless be authorized and empowered to make any settlements and accountings in any court of competent jurisdiction at any time or times when the Trustees in

their discretion deem such a settlement or accounting to be reasonably necessary or advisable for the benefit of the trust or the Trustees and all reasonable fees and expenses of the trust or Trustees incident to such settlements or accountings shall be borne by the Trust. In any event, the Trustees shall keep accurate records of all the trust assets of the nature and amount of all receipts and disbursements and of other transactions affecting the trust.

In addition to all other rights and powers conferred by law or elsewhere in this instrument, the Trustee of each trust created under this will be hereby accorded the rights and powers set out hereinafter in paragraphs (a) through (q) of this Item Four, and may exercise the same and act in accordance therewith without application to any court for leave or confirmation:

(a) To sell at public or private sale, for cash or on terms, to grant leases of every kind (including without limitation those relating to timber cutting or naval products) for periods within or beyond the duration of the trust, and to exchange all or any portion of said Trust Estate (including real, personal and mixed property) at such time, for such consideration, and upon such terms and conditions as the Trustees may deem advisable, all without liability on the other parties to see to the proper application of the proceeds, and to execute all instruments necessary or proper to effect or evidence such sale, lease or exchange.

(b) To grant and convey by lease or other instrument, for terms within or beyond the duration of the trust, the right to explore for and to produce and remove oil, gas and minerals on, in or from any lands at any time constituting a

part of the Trust Estate, and to grant perpetual easements or easements for terms within or beyond the duration of the trust on, over and with respect to any such lands.

(c) To retain any of the bonds, shares of stock, real property or other property passing to the Trustees hereunder (whether or not such assets be of a kind or consist of such proportions as fiduciaries are authorized by law or custom to invest in, including but not limited to capital stock in any bank them serving as Trustees), permanently or for such time as to the trustees shall seem advisable, without liability for any loss the Trust Estate may sustain by reason of the Trustees so doing, and to dispose of the same by sale or exchange or otherwise as and when the Trustees shall deem advisable, and to invest and reinvest the proceeds of the property so disposed of in accordance with the provisions of paragraph (1) below.

(d) To compromise, arbitrate or otherwise adjust claims in favor of or against the Trust Estate or the Trustees.

(e) To insure, replace, repair, rebuild, improve, maintain and demolish any buildings or improvements that may be a part of the Trust Estate and for such purposes to set up reserves out of income received.

(f) To vote all shares of stock at any time forming a part of the Trust Estate at corporate meetings, to waive any notice and give any consent for or with respect to such shares of stock and to give and delegate to any attorney-in-fact or proxy any power given herein to said Trustees with respect to such shares of stock, exercise any rights or options with respect to any such stock,

and to cause any stocks, bonds or other securities to be registered in the name of the nominee or nominees of the Trustees, and to participate in any reorganization or liquidation of any corporation in which the Trustees hold stock.

(g) To determine what losses, expenses and other items shall be charged against principal and what against income and to charge the premiums of securities purchased at a premium either against principal or income or partly against income and partly against principal in such manner as to provide a fair distribution or apportionment between income and principal.

(h) To treat any proceeds from interests in minerals, timber or other natural resources, and stock dividends and other extraordinary non-cash dividends, and realized appreciation of assets and other type assets received by the Trustees as income or principal of the Trust Estate or to apportion the same between income and principal, in such manner as to provide a fair distribution or apportionment between income and principal.

(i) To borrow funds if the Trustees deem such action to be reasonably necessary to protect or preserve the Trust Estate or any part thereof, or its income, or if the Trustees in the Trustees discretion deems such action to be in the best interest of the income beneficiary; and, in connection therewith, to mortgage or encumber any part of the Trust Estate and to execute notes, mortgages, deeds of trust, security agreements, financing statements and any other instruments, upon such terms and for such duration (not limited to the duration of this trust) as the

Trustees in the Trustees' discretion deems appropriate.

(j) To give and execute powers of attorney for the cancellation of any mortgages, to continue mortgages beyond and after maturity, with or without renewal or extension, upon such terms as may seem to the Trustees advisable; to foreclose, as an incident to collection of any bond or note, any mortgage or pledge securing such bond or note, and to purchase the mortgaged or pledged property or acquire the same by conveyance with out foreclosure; and to retain any property bought in under foreclosure or taken over without foreclosure for such time as to the Trustees shall deem best.

(k) To pay from the income or corpus of the Trust Estate any taxes which may be assessed thereon and any and all expenses that may properly be incurred in or about the management of the trust, including but not by way of limitation all insurance premiums to protect the assets and activities of the trust and Trustees from all hazards, casualties and liabilities as the Trustees deems proper.

(l) To invest and reinvest said Trust Estate and the proceeds of sale or disposal of any portion thereof in such bonds, mortgages, stocks (common and preferred), securities, any discretionary or other type common trust funds administered by bank which is the Trustees, real property or other property or interests in property of any kind as the Trustees in the Trustees' discretion may deem advisable without regard to any constitutional, statutory or other restrictions or limitations on or rules or regulations with respect to investment of trust funds, all of

which restrictions, limitations, rules and regulations are hereby waived and may be entirely disregarded by the Trustees.

(m) To make distribution of principal, when such becomes payable or distributable, in kind or in cash or partly in kind and partly in cash, and if advisable in the Trustees' opinion the Trustees may, by a sale or sales thereof, convert into cash any securities, property or other type of investment then constituting a part of the Trust Estate before making such distributing. Any real property, securities or other property distributed by the Trustees under the foregoing provisions hereof shall be taken at the fair market value thereof at the time of such distribution or, if the same have not a market value, then at such fair and reasonable value as the Trustees shall deem proper and the determination of the Trustees as to the fairness of such distribution shall be conclusive and binding upon all parties concerned.

(n) To employ and consult with attorneys, tax advisers, accountants, appraisers, realtors, property managers and other agents and advisers as the Trustees deem necessary or proper, to pay their reasonable fees as charges on either income or corpus as the Trustees may deem appropriate, and acting in good faith, to rely and act upon the advice of them or any of them without liability.

(o) If any beneficiary under the dispositive provisions of the trust shall become entitled to receive any payment from the Trustees, whether automatic or discretionary and whether out of the income or corpus, at a time when in the reasonable determination of the Trustees, it

would be impracticable or inadvisable to make such payment to the beneficiary because of the beneficiary's physical or mental condition or because the beneficiary is then under any incapacitation or legal disability, then the Trustees are hereby authorized to apply such income or corpus, for the sole benefit of the beneficiary, by making such payment for his benefit directly to his spouse, guardian, parent or the person in loco parentis to, or to the person with custody of the person of, such beneficiary, or directly to any medical or care institution where such beneficiary may be confined or may be receiving treatment, or to any educational institution at which he may then be attending or preparing to attend, or to any other person, firm or corporation for any goods, services or expenses whatsoever which the Trustees deem proper; and the Trustees shall be fully and finally released and discharged of any further liability or responsibility for any such payments. However, the Trustees are hereby expressly authorized to make any payment for any beneficiary under this trust directly to said beneficiary notwithstanding the fact that the beneficiary is under the disability of nonage or is under any other disability, without the necessity of paying same to a guardian or other adult person, provided the Trustees in the Trustees' sole discretion deems the beneficiary to be sufficiently mature and responsible to appreciate the value of such payment, and the Trustees shall likewise be fully and finally released and discharged from any further liability or responsibility for any payments so made.

(p) To resign as trustees by giving written notice to the adult beneficiaries then entitled to

the income from the Trust Estate (or if none, to the parent, guardian, or conservator of any minor income beneficiary). No successor trustees shall be liable or responsible in any way for any acts, neglect or defaults of any predecessor trustees nor shall such successor trustees be required to take any action against such predecessors, but each successor trustees shall be liable only for such successor trustees' own direct acts, neglect and defaults in respect to property actually received by such successor trustees.

(q) To receive reasonable and customary compensation for the Trustees' services as Trustees and to retain same from income or to withdraw same from principal.

ARTICLE FIVE

I appoint Doris Anderson as Executrix, and James A. Tucker, Jr., as a Co Executor of this my Last Will and Testament, and I direct that they shall be exempt from posting any bond, filing any inventory of the property coming into their hands and making any report to any Court of their proceedings hereunder.

I vest my said Executors with full power and authority to sell, transfer and convey any property, real or personal, which I may own at the time of my death, and to do everything and every other act necessary or appropriate for the complete administration of my estate.

I, LILLIAN P. ANDREWS, the testatrix, sign my name to this instrument this 29th day of April, 1992, and being first duly sworn, do hereby declare to the

undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly, that I execute it as my free and voluntary act for the purposes therein expressed, and that I am 19 years of age or older, of sound mind, and under no constraint or undue influence.

/s/ Lillian P. Andrews
LILLIAN P. ANDREWS

We, Jodi W. Thomas and Teresa S. Marshall, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testatrix signs and executes this instrument as her last will and that she signs it willingly, and that each of us, in the presence and hearing of the testatrix, hereby sign this will as witnesses to the testatrix's signing, and that to the best of our knowledge the testatrix is 19 years of age or older, of sound mind, and under no constraint or undue influence.

Jodi W. Thomas residing at Jackson, AL.,

Teresa S. Marshall residing at Illegible, AL

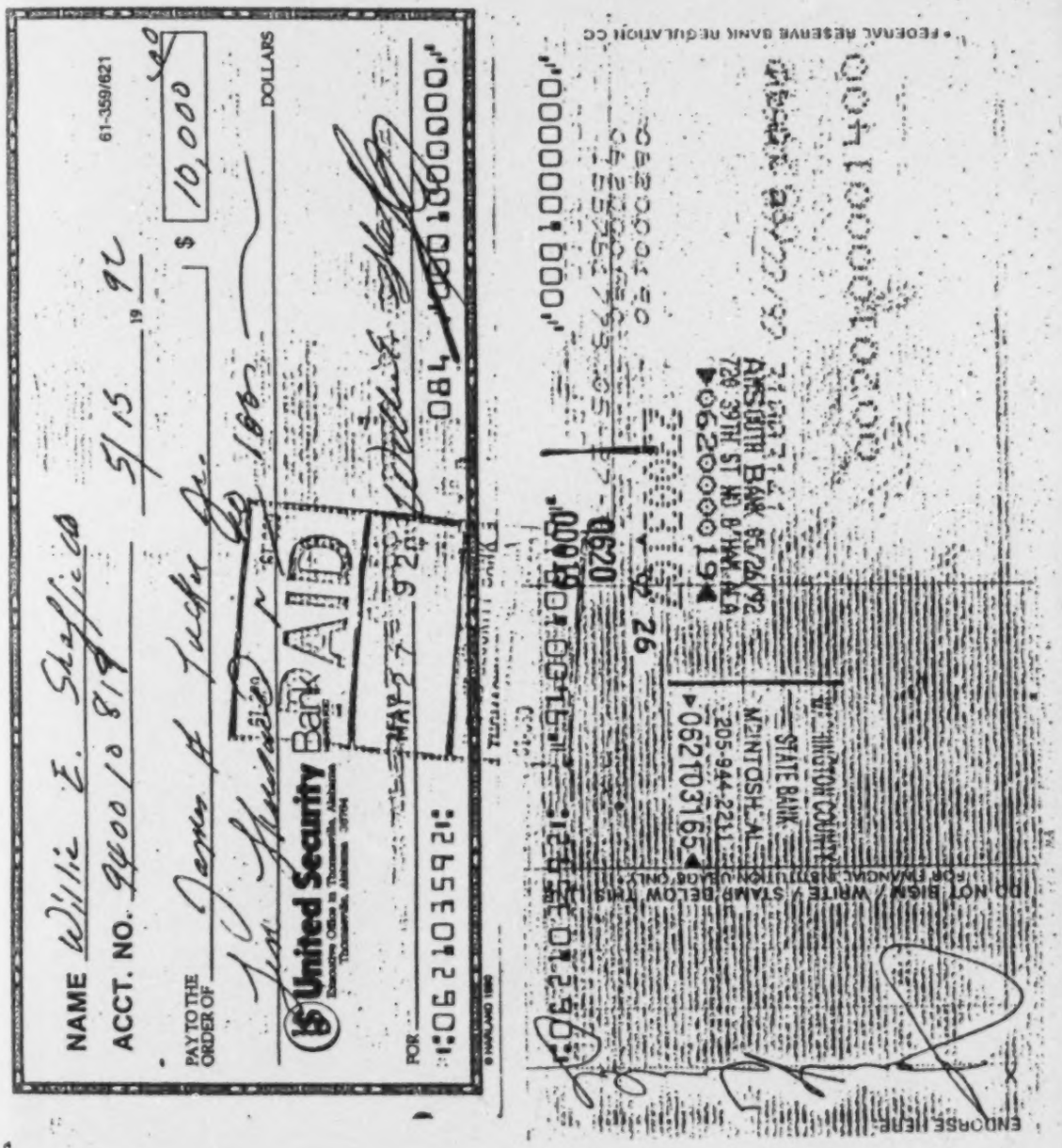
STATE OF ALABAMA*
COUNTY OF CLARKE*

Subscribed, sworn to and acknowledged before me by LILLIAN P. ANDREWS, the testatrix, and subscribed

and worn to before me by Jodi W. Thomas and Teresa S. Marshall, witnesses, this 29th day of April, 1992.

James A. Tucker, Jr.
NOTARY PUBLIC

APPENDIX B



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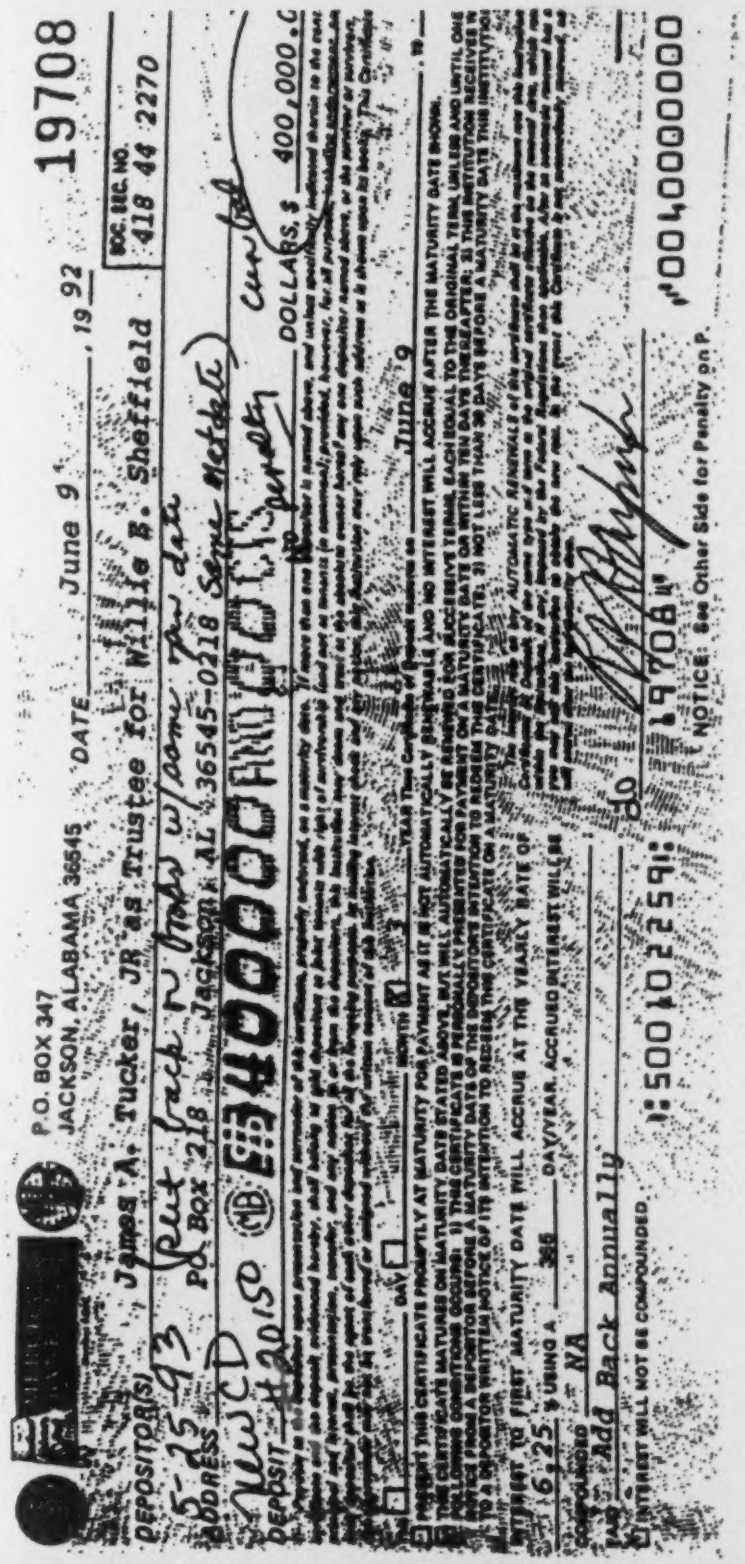
APPENDIX C



Date April 2 1993

No. of Signature Required

NOTICE OF PENALTY FOR EARLY WITHDRAWAL

Dear Depositor:

This Time Deposit account has a maturity date. Except as mention below, you cannot withdraw any principal from this account before t maturity date without our consent, and we must charge a penalty for ea withdrawal. We can only consent to an early withdrawal at the time y request it. The penalty will be an amount equal to:

- ☐ the greater of: (1) all the interest earned on the amount withdrawn from t most recent of the date of deposit or last renewal, or (2) all interest that co have been earned on the amount withdrawn during a period equal to one-ha the maturity period.
- ☐ one month's interest on the amount withdrawn.
- ☒ three months' interest on the amount withdrawn.
- ☐ _____

We will use the nominal (simple interest) rate in effect to calcula the amount of the penalty. We will charge the penalty first against t interest remaining in the account at the time of the withdrawal, and ar excess will be deducted from the amount you withdraw.

Minimum Balance Accounts: For any time deposit account which requires minimum initial deposit or a minimum balance, we reserve the right to tre any withdrawal which would reduce the balance remaining in the accour below such minimum as a withdrawal of the entire account balance, an calculate the amount of the penalty accordingly. This right is in addition t any other conditions stated in the deposit agreement.

EXCEPTIONS:

1. WE MUST CONSENT TO A REQUEST FOR EARLY WITHDRAWAL WITHOUT PENALT IF ANY ACCOUNT OWNER DIES OR IS DECLARED INCOMPETENT.
2. WE MUST CONSENT TO A WITHDRAWAL REQUEST IF THIS IS AN I.R.A. OR KEOG ACCOUNT AND THE REQUEST IS MADE WITHIN SEVEN DAYS OF ESTABLISHIN THE ACCOUNT. THE PENALTY IN SUCH CASE WILL BE ALL INTEREST EARNED O THE AMOUNT WITHDRAWN.
3. WE ARE PERMITTED TO WAIVE THE PENALTY IF THIS IS AN I.R.A. OR KEOG ACCOUNT AND YOU ARE AT LEAST 59½ YEARS OF AGE OR DISABLED AT TH TIME OF THE REQUEST.

SET-OFF: You each agree that we may (without prior notice and when permitted b law) set-off the funds in this account against any due and payable debt owed to us now or in the future, by any of you having the right of withdrawal, to the extent of such persons' or legal entity's right to withdraw.

This right of set-off does not apply to this account if: (a) it is an IRA or a tax-deferre retirement account; or (b) the debt is created by a consumer credit transaction under a credit card plan; or (c) the debtor's right of withdrawal arises only in a representative capacity.

NOT NEGOTIABLE — NOT SUBJECT TO CHECK

MERCHANTS BANK Jackson

P.O. BOX 347
JACKSON, ALABAMA 36545

Issued in lieu of CD# 19708

DATE June 9 19 92 20150

DEPOSITOR(S) James A. Tucker, JR as Trustee for Willie E. Sheffield

SOC. SEC. NO. 418 44 2270

ADDRESS PO Box 218 Jackson, AL 36545-0218

DEPOSIT MB $400000AND00CTS DOLLARS, $ 400,000.00

Payable to the depositor upon presentation and surrender of this certificate, properly endorsed, on a maturity date. If more than one depositor is named above, and unless specifically indicated therein to the contrary, this certificate and the deposit evidenced hereby, shall belong to said depositors as joint tenants with right of survivorship (and not as tenants in common); provided, however, for all purposes, including endorsement, payment of principal and interest, presentation, transfer, and any notice to or from the depositors, this institution may deem and treat as the absolute owner hereof any one depositor named above, or the survivor or survivors, and each such depositor shall be the agent of each other depositor for all the foregoing purposes. In mailing interest check and any notice, this institution may rely upon such address as is shown upon its books. This Certificate and any right hereunder may not be transferred or assigned without the written consent of this institution.

The ☐ DAY ☐ MONTH ☒ 36 YEAR Time Certificate of Deposit matures on June 9 19 95

☐ PRESENT THIS CERTIFICATE PROMPTLY AT MATURITY FOR PAYMENT AS IT IS NOT AUTOMATICALLY RENEWABLE AND NO INTEREST WILL ACCRUE AFTER THE MATURITY DATE SHOWN.

☐ THIS CERTIFICATE MATURES ON MATURITY DATE STATED ABOVE, BUT WILL AUTOMATICALLY BE RENEWED FOR SUCCESSIVE TERMS, EACH EQUAL TO THE ORIGINAL TERM, UNLESS AND UNTIL ONE OF THE FOLLOWING CONDITIONS OCCURS: 1) THIS CERTIFICATE IS PERSONALLY PRESENTED FOR PAYMENT ON A MATURITY DATE OR WITHIN TEN DAYS THEREAFTER; 2) THIS INSTITUTION RECEIVES WRITTEN NOTICE FROM A DEPOSITOR BEFORE A MATURITY DATE OF THE DEPOSITOR'S INTENTION TO REDEEM THIS CERTIFICATE; 3) NOT LESS THAN 30 DAYS BEFORE A MATURITY DATE THIS INSTITUTION MAILS TO A DEPOSITOR WRITTEN NOTICE OF ITS INTENTION TO REDEEM THIS CERTIFICATE ON A MATURITY DATE.

INTEREST TO FIRST MATURITY DATE WILL ACCRUE AT THE YEARLY RATE OF 6.25 % USING A 365 DAY/YEAR. ACCRUED INTEREST WILL BE COMPOUNDED NA PAID Add Back Annually

☒ INTEREST WILL NOT BE COMPOUNDED

The interest rate on any AUTOMATIC RENEWALS of this certificate shall be at the maximum rate this institution pays on Certificates of Deposit of the same type and term as the original certificate effective on the renewal date, which rate will be within the limitations, if any, imposed by the Federal Regulations then applicable. After an automatic renewal has occurred, you may call this institution to obtain the new rate. In the event the Certificate is not automatically renewed, no interest will accrue after maturity date.

:500102259: 20150

AUTHORIZED SIGNATURE

NOTICE: See Other Side for Penalty on Payment of Time Deposit Before Maturity

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:

WILLIE E. SHEFFIELD, Misc. Action No. 96-0001-RV-S

Debtor.

ORDER

(Filed Apr. 22, 1996)

This matter is before the court on debtor Willie E. Sheffield's ("Sheffield") challenge to Bankruptcy Judge Margaret Mahoney's January 2, 1996 "report and recommendation and certification to the U.S. District Court of civil and criminal contempt" (see tab 1) and February 12, 1996 "supplemental report and recommendation to the district court regarding debtor's civil and criminal contempt" (tab 6). By her orders, Judge Mahoney recommends that the district court hold Sheffield in civil and/or criminal contempt for failing to turn over to the bankruptcy trustee approximately $490,000 in cash proceeds of two certificates of deposit.

By order dated February 22, 1996, the court ordered Sheffield to show cause why he should not be held in civil and/or criminal contempt in accordance with Judge Mahoney's original and supplemental recommendations. Proceeding through retained counsel, Sheffield (1) basically disagrees with Judge Mahoney's conclusion that Sheffield's account of the disappearance of the cash proceeds was incredible; (2) asserts that adoption of Judge

Mahoney's recommendations "without a hearing and prior to a determination (by the undersigned of Sheffield's appeal from Judge Mahoney's order by which Sheffield was ordered to turn over the cash proceeds to the bankruptcy trustee] will result in the incarceration of Sheffield, denying Sheffield his rights to due process of law, the right to confront his accusers, the right to trial by jury, and other rights afforded by the Constitution of the United States of America and the laws of this State;" (3) requests the appointment of experienced criminal counsel to assist him in the proceedings before this court; (4) requests a *de novo* hearing and argument on Judge Mahoney's contempt findings; (5) requests consolidation of this case with Sheffield's pending appeal from Judge Mahoney's turn-over order (*Sheffield v. Armstrong,* Civil Action No. 96-0139-RV-C); and (6) asks the court to stay Judge Mahoney's contempt finding pending the outcome of the *de novo* hearing.

H. Scott Armstrong ("Armstrong"), the bankruptcy trustee, (1) opposes consolidation of this case with Civil Action No. 96-0139; (2) contends that Sheffield, who has retained bankruptcy counsel and is represented by attorney Tom Haas in a pending state court criminal action, is not entitled to appointed counsel before this court; (3) asserts that a *de novo* review of the record in this case, rather than a *de novo* hearing, is all that is required; and (4) objects to Sheffield's request for a stay of the contempt finding.

The court has conducted a *de novo* review of the file in this case, including Judge Mahoney's January 2 and February 12 orders. The court also has reviewed the records on appeal in *Sheffield v. Armstrong,* Civil Action

No. 96-0139-RV-C, and *Andrews v. Sheffield*, Civil Action No. 96-0140-P-S, both of which include the written transcript of the August 29, 1995, meeting of creditors at which Sheffield testified and the written transcript of a hearing that was held before Judge Mahoney on September 5, 1995, and at which Sheffield also testified. Having done so, the court makes the following legal and factual determinations.

A. Facts

The facts leading up to the Judge Mahoney's contempt orders are as follows: On April 29, 1994, a civil action was filed against Sheffield in the Circuit Court of Clarke County, Alabama, by Lillian Andrews ("Andrews"), individually and as attorney-in-fact for Minnie May Pugh. By this suit, Andrews sought damages for fraud perpetrated by Sheffield in connection with certain real estate transactions. Andrews also sought to quiet title to certain real property she claimed was owned by her.[1]

On September 6, 1994, while the Andrews suit was pending, Sheffield purchased two one-year term $250,000 certificates of deposit at the Merchants Bank of Jackson, Alabama. One C.D. was issued to "Adam Henson or Willie Sheffield;" the other was issued to "Abby Hanson or Willie Sheffield." Adam and Abby Henson, ages 6 and

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[1] At the time the Andrews suit was filed, Sheffield was also a defendant in another Clarke County state court action alleging fraud by Sheffield in connection with a land purchase.

4, respectively, are Sheffield's grandchildren and the issue of Sheffield's only child, Susan Sheffield Henson.[2]

The Andrews suit was tried to a jury beginning in January 1995. On Friday, February 3, the jury returned a verdict against Sheffield for $10.00 in compensatory damages and $2,000,000 in punitive damages. A formal judgment was entered by the trial judge on the jury's verdict on February 8, 1995. (The monetary judgment was also entered against Attorney James A. Tucker, Jr.).[3]

On or about February 6, Susan Henson went to the Merchants Bank and attempted to cash the two certificates of deposit. On advice of counsel, the bank refused to cash the C.D.s that day. On February 10, two days after the day on which the actual written judgment was entered against him, Sheffield attempted to cash in the C.D.s himself. The bank could not honor Sheffield's request at that time because Sheffield demanded cash, and the bank did not have sufficient cash on hand to satisfy its obligation. Sheffield, however, was instructed to return to the bank for the cash the following week.

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[2] The C.D.s were purchased with a counter check for $100,000 drawn on Merchants Bank and two $200,000 cashier's checks payable to Sheffield and respectively dated October 29, 1993, and March 11, 1994.

[3] Subsequent to the events related below, a remittitur was ordered by the state court and accepted by Andrews, leaving a final judgment for $1,000,010 ($10.00 in compensatory damages and $1,000,000 in punitive damages). The judgment was unanimously affirmed by the Alabama Supreme Court on April 12, 1996. *Sheffield v. Andrews*, ___ So. 2d ___ (Ala., Apr. 12, 1996).

On Monday, February 13, the C.D. proceeds of $508,861.29 (which included interest minus an early withdrawal penalty and a portion of the bank's transaction costs in transporting the cash via a special armored car from the Federal Reserve Bank in Birmingham) were counted out in Sheffield's presence and delivered to Sheffield in a cloth bag. The proceeds were paid in one hundred dollar and twenty dollar denominations. Sheffield returned with the cash to his home in Grove Hill. He left the cash in his truck overnight, fearful that he might lose the cash if his house burned down.

On February 14, 1995, Sheffield left his home in Grove Hill alone with the money in the bank bag on the floorboard of his truck. He proceeded to Florida, where he purchased a total of $220 in Florida lottery tickets. He then proceeded to the Mississippi Gulf Coast to gamble.

What next occurred is crucial to these proceedings. Sheffield offered detailed testimony at the 341 Meeting of Creditors and, later, some additional testimony at a September 5 hearing before Judge Mahoney, concerning his activities of the next several hours. According to Sheffield, he consumed a Tylenol IV north of Ocean Springs and then proceeded to the Grand Casino in Biloxi. Arriving in the early afternoon, he took approximately $10,000 out of the bank bag, went into the Grand Casino, and won approximately $2,000-2,500 playing craps. Around 6:00 p.m. he went to the Isle of Capri Casino (also in Biloxi) and, gambling with his Grand Casino winnings and the $10,000 he previously had removed from the bank bag, lost approximately $7,000-8,000 playing craps. Two or three hours later, he went to a third Biloxi Casino, Casino Magic, parked near the front entrance, took

another $10,000 or so from the bank bag, and lost another $7,000-8,000, again, playing craps. While at Casino Magic, Sheffield took another Tylenol IV, consumed the first alcoholic beverage of his life (a brandy on the rooks), and took a prescription muscle relaxant.

Around 10:00 p.m., Sheffield left Casino Magic and drove to the Grand Casino, intending to stay at Grand Casino's hotel for the night. When he got in his truck, he did not check to see if the bank bag was still on the floorboard of his truck. He had left a hunting jacket on top of the bank bag when he went into casino Magic earlier in the evening. Finding the jacket undisturbed when he returned to the truck, he assumed that the bank bag, with the money in it, was where he had left it.

Upon returning to the Grand Casino, Sheffield decided to sleep in his truck in the casino parking lot so that he would not have to take the money inside the hotel. He reclined his seat and fell asleep. Although he never checked to be sure, Sheffield testified that he believed the bank bag, containing approximately $488,600, was still on the truck floorboard, under his jacket, where he had left it. He locked his side of the truck, but did not check to be sure that the passenger door was locked.

When he awoke at 3:25 a.m., Sheffield looked for the money inside and outside of the truck, but it was gone. There was no damage to his truck, and he had not been awakened by someone opening the truck's door. He did not report the loss to anyone, including law enforcement authorities; instead, he immediately drove home.

Sheffield returned to Biloxi alone the next day and asked a guard and a "stick man" at the Grand Casino if "there had been any excitement" or "if anybody had been throwing away money" the previous evening. When they said no, he gambled with the remaining money he had in his possession, ate lunch, and went home. Again, he did not report the loss to any law enforcement authorities.

Sheffield testified that the money "would have had to have been stolen from the time [he] went into the [Casino] Magic because [he] got ten thousand out of it then, from that time till the time [he] woke up," but he never returned to the Casino Magic to investigate. He further testified that one reason he returned to the Grand Casino was to determine whether he, himself, had, after going to sleep in the truck, gone back into the casino and gambled away the money without recalling it. Although Sheffield allegedly told his wife about the loss, he did not tell his daughter, whose children, as noted, were named on the C.D.s.

Sheffield filed a Chapter 11 bankruptcy petition on July 13, 1995, and served as debtor-in-possession until early September 1995, when Armstrong was appointed trustee. The 341 Meeting of Creditors (at which Sheffield testified concerning the loss of the cash proceeds) was held on August 29, 1995. Shortly after his appointment, Armstrong informally requested Sheffield to turn over the proceeds of the aforementioned C.D.s. Sheffield refused, contending that the proceeds were not in his possession or control and asserting that he did not know in whose possession the proceeds might be. Armstrong then filed a motion pursuant to Bankruptcy Rules 7001(1)

and 9014 for a court order directing Sheffield to turn over the proceeds. A hearing on the motion was held on November 14.[4]

Also on November 14, Judge Mahoney entered an order in an adversary proceeding brought against Sheffield by Andrews to preclude Sheffield's discharge of indebtedness. By her order, Judge Mahoney granted Andrews's motion for summary judgment, concluding as a matter of law that Sheffield's indebtedness should not be discharged because Sheffield was unable to provide a satisfactory explanation for the disappearance of the cash proceeds.

By order dated November 17 and based on the facts and conclusions set forth in her November 14 order, Judge Mahoney granted Armstrong's motion for turnover of the case proceeds. Sheffield was directed to turnover the proceeds by November 27, 1995.

Sheffield did not turn-over the proceeds, as directed. Thus, in late November, Armstrong moved for an order directing Sheffield to show cause why he should not be held in contempt. A hearing was held on December 18,

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[4] The trustee introduced exhibits at the hearing documenting the events leading up to Sheffield's cashing of the C.D.s. He also introduced the transcript of prior proceedings before the Bankruptcy Court (specifically, a September 5, 1995, hearing before Judge Mahoney), during which Sheffield rendered his explanation for the disappearance of the cash proceeds, and presented three witnesses, who testified about the circumstances surrounding Sheffield's acquisition and cashing of the C.D.s. Sheffield presented no evidence. The court does not have a transcript of this hearing, although the exhibits that were introduced are before the court.

during which Sheffield acknowledged that he had not complied with the turn-over order and stated that he had not had the cash proceeds since February 14, 1995.[5]

By order dated January 2, Judge Mahoney rejected Sheffield's explanation for the disappearance of the cash and recommended that Sheffield be held in criminal and/or civil contempt for failing to comply with the November 17 turn-over order. She specifically noted that a civil or criminal fine would not be workable or appropriate, especially considering that most of Sheffield's assets are under the control of the bankruptcy trustee and the remainder of his assets – his exempt assets – are not sizeable. She ultimately concluded that only incarceration might induce Sheffield to produce the "stolen" money and, thus, recommended that this court order him "incarcerated until he produces the $500,000 or provides sufficient information to the Trustee about the whereabouts of the money or the person(s) who have it." Pursuant to objections filed by Sheffield, Judge Mahoney amended her January 2 order by order dated February 12, but only by directing that Sheffield may cleanse himself of his contempt by producing "at least $490,000 or explain[ing]

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[5] Neither party asked that a transcript of this hearing be included as part of the record on appeal in Civil Action No. 96-0139 or 96-0140, and the transcript is not a part of the record in this miscellaneous case. The court does not believe that the absence of this transcript is critical to the outcome of these proceedings, considering that the information forming the basis of the contempt – Sheffield's acknowledged failure to turn-over the cash proceeds, combined with his previously-recounted story as to the disappearance of those proceeds – is well-supported by the records in Civil Action Nos. 96-0139 & 96-0140.

its whereabouts or name the party or parties who know its whereabouts."[6]

By this miscellaneous action, Sheffield challenges Judge Mahoney's original and supplemental contempt orders. Also pending before the undersigned is Sheffield's appeal from the November 17 turn-over order (Civil Action No. 96-0139).[7] Judge Pittman, to whom Sheffield's appeal in the Andrews bankruptcy adversarial proceeding was assigned, affirmed Judge Mahoney's summary judgment order on April 16, 1996 (Civil Action No. 96-0140). In so doing, he concluded, "[v]iewing [Sheffield's explanation for the disappearance of the cash] in the light that the state court judgment rendered against him included a fraud count, . . . that Sheffield's account of the event is too incredible to believe."[8] continuing, he emphasized: "No reasonable jury could come to any other conclusion and summary judgment is appropriate."

The factual findings made by Judge Mahoney in her two contempt orders are clearly supported by the record in this case and in Civil Action Nos. 96-0139 & 96-140, with one minor exception. by the court's calculations, Sheffield left the Merchants Bank with $508,861.29 in cash proceeds on February 13. He spent a total of $220 on

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[6] The $490,000 figure represents the amount Judge Mahoney concluded Sheffield probably had remaining following his gambling junket.

[7] Appellant's reply brief is due to be filed in that case on or about April 26, 1996.

[8] Judge Pittman further noted that the Clarke County Circuit Court had found similarly, when it ruled on Sheffield's motion for new trial in the Andrews case.

Florida lottery tickets, and later removed a total of $20,000 from the bank bag to gamble. Assuming that he spent all of that money, as well as the $2,500 that he won at the Grand Casino, Sheffield has been unable to offer sufficient explanation as to the disappearance of $488,641.29. The court believes it is that amount, rather than $490,000, that Sheffield either must produce or with respect to which Sheffield must provide an explanation as to its whereabouts.

B. Discussion

As a preliminary matter, the court agrees with the trustee that this miscellaneous action should not be consolidated with Civil Action No. 96-0139. That is so principally because of the different standard of review that applies to the factual findings in each case.

The court shall withhold at this time considering of whether Sheffield should be held in criminal contempt and focus exclusively on whether Sheffield should be held in civil contempt and subject to remedial incarceration.[9] The court agrees with Judge Mahoney that the

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[9] In view of this holding, the court finds it unnecessary to address Sheffield's request for appointment of experienced counsel to present him in criminal contempt proceedings.

Judge Mahoney correctly noted that bankruptcy judges have civil contempt power, *see In re Maxair Aircraft Corp.*, 148 B.R. 353 (M.D. Ga. 1992); *In re Sun-Island Realty, Inc.*, 177 B.R. 991 (S.D. Fla. 1994), and can order incarceration as a civil contempt penalty, *Maxair Aircraft*, 148 B.R. 353. Because of her concern that bankruptcy judges may not have criminal contempt power and her belief that Sheffield should be held in

imposition of a civil remedial fine would not be appropriate in this case.

Bankruptcy Rule 9033(d) sets forth this court's standard of review on appeal from orders, such as those that are involved in these proceedings,[10] entered in a non-core bankruptcy proceeding pursuant to 28 U.S.C. 157(c):

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criminal contempt, however, she elected not to issue an order holding Sheffield only in civil contempt and ordering his remedial incarceration. Instead, she elected to issue a report and recommendation on both criminal and civil contempt and certify her findings to this court pursuant to Bankruptcy Rules 9020 and 9033.

As noted in text, this court shall focus only on the civil contempt recommendation at this time. The court, however, shall not remand these proceedings to Judge Mahoney for the imposition of a civil contempt remedy even though she clearly has the authority to order that relief. The court believes that Sheffield will not be harmed by this court's consideration of the civil contempt recommendation apart from the criminal contempt recommendation. The court wishes to retain jurisdiction over this matter so that it may, at a later time, consider whether Sheffield should be held in criminal contempt as well.

Bankruptcy Rule 9020 sets forth the procedures that a bankruptcy judge must follow in contempt proceedings. There is no contention in this case that those procedures were not followed; in fact, it appears that they were.

[10] This court shall assume, as the court did in *In re Ragar*, 3 F.3d 1174, 1178 n.3 (8th Cir. 1993), that criminal contempt matters are non-core proceedings. As noted *supra* in footnote 7, the court believes that this matter is properly before the court, even though the court shall pretermit consideration of the criminal sanctions at this time and focus, exclusively, on the civil contempt aspect of Judge Mahoney's orders.

> The district judge shall make a *de novo* review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, received further evidence, or recommit the matter to the bankruptcy judge with instructions.

The Rule's requirement of a *de novo* review of the record generated in the bankruptcy court when specific written objections have been made to the bankruptcy judge's findings or conclusions is mandatory. *See in re Ragar,* 3 F.2d 1174, 1178 (8th Cir. 1993). By its terms, however, the Rule vests the district court with discretion in determining whether additional evidence should be taken or a hearing should be held. *See In re Castro,* 919 F.2d 107, 108 (9th Cir. 1990) ("[N]ew hearings are not required for *de novo* review. . . . ").

"In order for a party to be cited for civil contempt, a court must find that the party violated a specific and definite court order and that party had knowledge of the order sufficient to put him on notice of the proscribed conducted [sic]." *In re Skinner,* 90 B.R. 470 (D.Utah 1988), *aff'd,* 917 F.2d 444 (10th Cir. 1990) (citation omitted). Additionally, for civil contempt to be an appropriate sanction, the contemnor must have violated a lawful order of the court. *CFTC v. Wellington Precious Metals, Inc.,* 950 F.2d 1525 (11th Cir. 1992). "Intent is not an element of civil contempt." *In re Norris,* 192 B.R. 863 (W.D. La. 1995).

The moving party must prove civil contempt by clear and convincing evidence. *In re Spanish River*, 155 B.R. 249 (Bankr. S.D. Fla. 1993); *see Wellington Precious Metals*, 950 F.2d at 1525. Once that burden has been satisfied, the burden then shifts to the respondent, who may defend on the basis of an inability to comply. *Wellington precious Metals*, 950 F.2d at 1529. The respondent, however, must "go beyond a mere assertion of inability." *Id.* at 1529 (citing *United States v. Hayes*, 722 F.2d 723 (11th Cir. 1984)).

In this case, the court is satisfied, based on its review of the record in this case and in Civil Action Nos. 96-0139 & 96-0140, that there was clear and convincing evidence that Sheffield knowingly and willfully violated the bankruptcy court's November 17 turn-over order. Sheffield disobeyed that order by failing to turn-over the cash proceeds of the two $250,000 C.D.s. The trustee's assertion that he did not have or receive any of those proceeds was undisputed. The bankruptcy court found incredible Sheffield's story about the disappearance of those proceeds.

Sheffield objects to Judge Mahoney's rejection of his testimony as incredible. The thrust of his contentions is that this court must hold an independent hearing on the matter so that it can judge Sheffield's credibility for itself.[11]

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[11] Sheffield further suggests that the trustee had an obligation to eliminate all other possible explanations for the disappearance of the cash by, for example, interviewing and calling witnesses who had knowledge that Sheffield was in possession of $500,000 in cash. He also contends that Armstrong

In the court's opinion, a hearing on Sheffield's objections is not required. Ordinarily, credibility determinations are for the fact-finder to make. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Where no reasonable fact-finder could believe the proffered testimony, however, a summary determination of the issue is appropriate.

In the undersigned's opinion, Sheffield's story as to the disappearance of the cash proceeds is incredible; indeed, it is preposterous, bizarre, and insulting. No reasonable fact-finder could conclude otherwise. Judge Pittman so concluded in Sheffield's appeal from Judge Mahoney's summary judgment order, and the undersigned so concludes in this case. Except as otherwise noted, Judge Mahoney's findings are fully consistent with the facts recounted above and are due to be ADOPTED as the findings of this court. Accordingly, Sheffield is due to be, and hereby is, adjudged in CONTEMPT OF COURT for failing to comply with Judge Mahoney's November 17 turn-over order.

The only real issue remaining concerns the remedy that should be imposed. As noted, the court believes, as does Judge Mahoney, that the imposition of a civil fine would serve no remedial purpose in this case. The only appropriate remedy, thus, is remedial incarceration.

Section 1826, 28 U.S.C., which applies to bankruptcy proceedings, *see In re Younger*, 986 F.2d 1376 (11th Cir.

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had to prove that Sheffield had knowledge of the whereabouts of the cash. The court disagrees that Armstrong had those burdens.

1993), establishes the maximum period of incarceration that may imposed for civil contempt involving a recalcitrant party-witness. In relevant part, that section provides:

> Whenever a witness[12] in any proceeding before or ancillary to any court . . . of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording, or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. *No period of such confinement shall exceed the life of . . . the court proceeding . . . before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.*

28 U.S.C. § 1826(a) (emphasis added).

Whether incarceration ordered upon a finding of contempt is considered civil or criminal does not depend upon the length of incarceration, but instead hinges on the purpose for which incarceration is ordered. *See Shillitani v. United States*, 384 U.S. 364, 369 (1969) (in determining whether contempt proceedings are civil or criminal in nature, proper focus is "the character and

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[12] The provisions applies to party as well as non-party witnesses. *See United States v. Mitchell*, 556 F.2d 371 (6th Cir.), *cert. denied*, 434 U.S. 925 (1977).

purpose" of the action. Civil contempt, attended by remedial incarceration, does not carry with it a right to a jury trial. *Cheff v. Schnackenberg*, 384 U.S. 373, 377 (1966); *Shillitani*, 384 U.S. at 365; *In re Sun Island Realty, Inc.*, 177 B.R. 391, 396-97 (S.D. Fla. 1994).

In this case, incarceration is the only remedy appropriate under the circumstances and it shall be imposed for the express and limited purpose of coercing Sheffield either to turn-over $488,641.29 in cash proceeds from the two $250,000 C.D.s discussed above, or explain the whereabouts or name the party or parties who knows the whereabouts of those proceeds. In accordance with 28 U.S.C. § 1826, Sheffield shall be incarcerated until he purges himself of contempt, but in no event shall the term of incarceration exceed the lesser of eighteen months from the date on which he is taken into custody or the life of his pending bankruptcy proceedings.

Conclusion

Pursuant to the foregoing, the court ORDERS as follows:

1. William E. Sheffield is hereby declared in CONTEMPT of court for his willful failure to comply with the order of the Bankruptcy Court dated November 17, 1995.

2. Willie E. Sheffield shall have ten (10) days from the date of this order in which to purge himself of the contempt by turning over to the trustee $488,641.29, providing an explanation as to its whereabouts, or naming the party or parties who know of its whereabouts.

3. If Willie E. Sheffield fails to comply with paragraph 2, above, he shall voluntarily surrender to the United States Marshals Service at the Federal Courthouse in Mobile, Alabama on the tenth day.

4. If Willie E. Sheffield fails to surrender voluntarily, a warrant for his arrest shall issue on the eleventh day.

5. Willie E. Sheffield may purge himself of contempt at any time during his incarceration (and thus end his incarceration) by turning over to the trustee $488,641.29, providing an explanation as to its whereabouts, or naming the party or parties who know of its whereabouts.

6. In carrying out this order, the United States Marshals and other officers of the United States are authorized to use whatever force is reasonably necessary in order to arrest and restrain Willie E. Sheffield. They may do so at any hour of the day or night and on any day of the week.

7. The Clerk of Court forthwith shall provide a copy of this order to David Mills, Sheffield's attorney, via facsimile transmission. A copy also shall be sent directly to Sheffield, via certified mail return receipt requested.

DONE this the 22 day of April, 1996.

/s/ Bill W. Vollmer, Jr.
UNITED STATES
DISTRICT JUDGE